

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LORI K. BECKER

Plaintiff,

v.

PRECOR, INC., et al.,

Defendants.

CASE NO. C08-1755RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on three motions: Plaintiff Lori Becker’s motion to compel discovery (Dkt. # 38), Defendants’ motion for protective order (Dkt. # 36), and Defendants’ motion to seal a document submitted in support of that motion (Dkt. # 46). No one has requested oral argument. For the reasons stated below, the court GRANTS both discovery motions in part and DENIES both of them in part. The court DENIES Defendants’ motion to seal.

II. BACKGROUND

Ms. Becker, who once worked for Defendant Precor, Inc. (“Precor”), claims that Defendant Vernon “Guy” Williams, a Precor sales director, sexually assaulted her in an automobile while they were traveling on Precor business in November 2007. Ms. Becker alleges that Precor failed to appropriately discipline Mr. Williams after it became aware

1 of the assault, and she alleges sexual harassment. She also alleges that Precor negligently
2 supervised and trained Mr. Williams.

3 Ms. Becker's counsel has become aware that a former Precor employee, Andrea
4 Garvey, accused Larry Domingo, a Precor vice-president, of sexual harassment in 2004.
5 Pond Decl. (Dkt. # 39) ¶ 3. No one disputes that Mr. Domingo is Mr. Williams' direct
6 supervisor, and no one disputes that he was one of the people responsible for disciplining
7 Mr. Williams in the aftermath of the incident with Ms. Becker. Ms. Becker does not
8 allege that Mr. Domingo has ever acted inappropriately toward her. According to a
9 lawsuit Ms. Garvey filed in Nevada state court, Mr. Domingo verbally assaulted her in
10 the Las Vegas airport in September 2007. During the alleged assault, he made repeated
11 reference to her allegations against him in 2004. Ms. Becker does not know Ms. Garvey.
12 They worked in different Precor offices, and their tenures as Precor employees did not
13 overlap.

14 The instant discovery dispute concerns several requests for production of
15 documents to Precor, one subpoena to Ms. Garvey's former attorney, and Ms. Becker's
16 plan to depose Ms. Garvey. The document requests seek, in essence, all Precor
17 documents related to Ms. Garvey. Although Precor has provided some documents, it has
18 declined to produce Ms. Garvey's 2004 internal complaint, or any documents relating to
19 Precor's response to that complaint. Precor has also declined to produce its settlement
20 agreement with Ms. Garvey.

21 Despite not producing documents about Ms. Garvey's 2004 complaint, Precor has
22 presented indirect evidence about them. Precor's human resources vice-president
23 declares that Ms. Garvey sent Precor a demand letter in 2004 that "made several
24 employment-related complaints against a handful of Precor employees." Takaki Decl.
25 (Dkt. # 49) ¶ 5. Sexual harassment was one of the complaints that the letter raised. *Id.*
26 Although the demand letter mentions Mr. Domingo, Precor claims that the letter made
27 "no specific sexual harassment allegation against him." *Id.* The human resources vice-

1 president also declares that the November 2004 settlement agreement resolving the
2 dispute does not mention Mr. Domingo and contains “[n]o separate portions relat[ing] to
3 Ms. Garvey’s sexual harassment complaints as opposed to her other complaints.” *Id.*

4 In a parallel effort to obtain information about Ms. Garvey’s claims, Ms. Becker
5 has issued a subpoena duces tecum to the Los Angeles attorney and law firm who
6 represented Ms. Garvey in 2004. Ms. Garvey’s counsel is allegedly willing to produce
7 documents, but in light of a confidentiality clause in Ms. Garvey’s settlement agreement
8 with Precor, he appears to be concerned about doing so without a court order. Pond Decl.
9 (Dkt. # 55) ¶ 2. Ms. Garvey’s counsel accordingly did not object to the subpoena, but he
10 has not responded to it either.

11 Finally, Ms. Becker intends to depose Ms. Garvey. For reasons not apparent to the
12 court, she has not subpoenaed Ms. Garvey. Ms. Garvey resides in Los Angeles.

13 Ms. Becker seeks an order compelling the production of Precor’s documents
14 related to Ms. Garvey and the investigation of her 2004 complaints, and an order
15 authorizing it to take discovery from Ms. Garvey and her former counsel. Defendants
16 request a protective order preventing the same discovery.

17 **III. ANALYSIS**

18 The court has broad discretion to control discovery. *Childress v. Darby Lumber,*
19 *Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004). That discretion is guided by several principles.
20 Most importantly, the scope of discovery is broad. A party must respond to any
21 discovery request that is “reasonably calculated to lead to the discovery of admissible
22 evidence.” Fed. R. Civ. P. 26(b)(1). A party who contends that responding to a
23 discovery request would entail “annoyance, embarrassment, oppression, or undue burden
24 or expense” can seek a protective order. Fed. R. Civ. P. 26(c)(1).

25 **A. Document Discovery**

26 For the most part, the court does not agree with Precor’s assertion that the
27 documents Ms. Becker seeks are beyond the broad scope of discovery. The court

1 acknowledges that Ms. Garvey's 2004 complaint against Mr. Domingo is far removed in
2 both time and space from Ms. Becker's allegations against Mr. Williams, and there is no
3 reason to suspect that whatever conduct Mr. Domingo allegedly engaged in is similar to
4 Mr. Williams' alleged assault on Ms. Becker. According to Ms. Garvey's 2008 lawsuit,
5 however, Mr. Domingo has not let the 2004 complaint fade into the past. He allegedly
6 remained angry at Ms. Garvey at least up to the time of his verbal assault on her in
7 September 2007, in part because her complaint forced him and other Precor employees to
8 undergo sexual harassment training. As the person at least partially responsible for Mr.
9 Williams' discipline and training, Mr. Domingo's conduct toward Precor sexual
10 harassment complainants, and his attitude about remedial measures in the wake of their
11 complaints, is at least potentially relevant. The potential relevance is even greater
12 because Mr. Domingo's alleged verbal assault on Ms. Garvey came only a few months
13 before he was called upon to discipline Mr. Williams.

14 As noted above, Precor has already presented evidence through its human
15 resources manager about Ms. Garvey's complaint and its resolution. Given that, Precor
16 cannot credibly claim any burden arising from producing the documentary evidence that
17 was before the manager when she made her declaration. If the manager's statements
18 about Ms. Garvey's complaint and its resolution are correct, then perhaps no admissible
19 evidence will come from the discovery Ms. Becker requests. Given the potential
20 relevance of the documents, however, Ms. Becker is entitled to examine them and make
21 that decision herself. Absent countervailing considerations, the court will not permit
22 Precor to selectively disclose information about documents related to Ms. Garvey's
23 complaint in an effort to avoid complete disclosure.

24 Precor raises two countervailing considerations. First, it alleges that Ms. Becker
25 and her counsel have conducted themselves inappropriately after obtaining the names of
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1 other sexual harassment complainants at Precor.¹ Precor previously produced discovery
2 to Ms. Becker that names other complainants. Armed with that information, Ms.
3 Becker's counsel admits to contacting some of the complainants. The court shares
4 Precor's concern that any contact with prior complainants be handled with appropriate
5 decorum, but nothing in the parties' declarations regarding these exchanges demonstrates
6 conduct warranting the court's intervention. If counsel continues contacting other
7 complainants (a practice the court in no way encourages), the court cautions counsel to
8 give the court no reason to intervene in the future. In addition, the court orders that
9 Precor can, at its option, redact the names of any complainants from documents it
10 produces going forward. If Ms. Becker believes from the context of the documents that it
11 is necessary to learn the identity of the complainants, she can raise the issue with Precor.
12 The court expects both parties to cooperate reasonably in this process, to both prevent
13 unnecessary intrusions into any complainant's privacy, and to permit Ms. Becker to
14 obtain appropriate discovery.

15 In light of counsel's contact with other complainants, Precor is understandably
16 concerned that Ms. Becker may be turning her focus away from Mr. Williams' conduct in
17 favor of an attempt to indict Precor as a whole. Those concerns, however, are best
18 addressed when (or if) Ms. Becker attempts to rely on that evidence either during
19 dispositive motion practice or at trial. Imposing discovery limits beyond those stated
20 above is not appropriate on the record before the court.

21 Second, Precor complains that its settlement agreement with Ms. Garvey is
22 confidential, and that the court should respect that confidentiality at least in part because

23 ¹ Precor's evidence about this subject comes in the form of a declaration from its human
24 resources director. McLean Decl. (Dkt. # 50). She contacted three Precor complainants to
25 inform them that their names had been disclosed in discovery, and that Ms. Becker's
26 representatives might contact them. Her declaration describes her conversations with the
27 complainants. Ms. Becker moves to strike these descriptions because they are hearsay. The
28 court finds the use of hearsay evidence in this instance to be preferable to forcing the
complainants to submit their own declarations. Moreover, nothing prevents the court from
considering hearsay evidence in a collateral matter.

1 to do otherwise would discourage settlement. On this record, although Precor raises a
2 close question, the court finds that it must disclose the settlement agreement. Ms. Becker
3 is aware that Ms. Garvey made a complaint that involved Mr. Domingo, this order will
4 entitle her to additional document discovery about that complaint, and she will
5 presumably take discovery from Mr. Domingo and Ms. Garvey to obtain additional
6 details. Given those sources of information, the settlement agreement would arguably
7 disclose no additional information except the money or other consideration exchanged in
8 the settlement. Thus, while the settlement agreement might merely duplicate information
9 obtained through other sources, there is no indication that its disclosure would unduly
10 burden Precor. Ms. Garvey and Precor apparently bargained to keep the settlement
11 confidential, although that consideration is likely more important to Precor than to her.
12 The court acknowledges that, speaking generally, preserving the bargained-for
13 confidentiality of settlement agreements will promote settlement. In this case, however,
14 the court finds this consideration insufficient to prevent discovery of the settlement
15 agreement. Precor substantially weakens its argument for confidentiality of the
16 settlement agreement by disclosing information about it through the declaration of its
17 human resources manager. Precor should not be permitted to selectively disclose
18 information about the documents in an effort to avoid producing them. The court will,
19 however, permit Precor to redact any portions of the settlement agreement that reveal the
20 exchange of monetary consideration. Ms. Becker has made no showing of the relevance
21 of that information, and forcing its disclosure would unnecessarily undermine the court's
22 policy of encouraging settlement.

23 In light of the above discussion, the court orders Precor to produce any documents
24 in its possession related to Ms. Garvey's 2004 complaint, Precor's investigation of that
25 complaint, its response, and its settlement agreement with Ms. Garvey. It may redact
26 these documents in a manner consistent with this order.

1 **B. Discovery from Third Parties**

2 To the extent the court has jurisdiction to resolve the parties’ disputes over third
3 party discovery, its resolution will mirror the previous section of this order. Ms. Becker
4 has subpoenaed Ms. Garvey’s counsel, but that subpoena issued from a federal court in
5 California. Ms. Becker has not yet attempted to depose Ms. Garvey, but presumably
6 could only do so via another subpoena issued from a California court. If any court has
7 jurisdiction over Ms. Garvey or her counsel, it is the court from which the subpoenas
8 issue. *See* Fed. R. Civ. P. 45(c)(3)(A)-(B) (placing subpoena enforcement power in the
9 “issuing court”). For at least that reason, Ms. Becker is simply mistaken when she
10 complains that Precor did not timely object to the subpoena to Ms. Garvey’s counsel.
11 Only the person to whom a subpoena is issued has standing to “object” to it (Fed. R. Civ.
12 P. 45(c)(2)(B)), and those objections can be resolved only before the court that issued the
13 subpoena.

14 The court does, however, have jurisdiction over Ms. Becker, and Precor is
15 permitted to move for a protective order to keep her from seeking certain discovery from
16 third parties. Fed. R. Civ. P. 26(c)(1) (permitting “any party” to seek a protective order
17 from the presiding court or in the court in whose jurisdiction a deposition will be taken).
18 For the reasons the court has already discussed, the court sees no reason to prevent Ms.
19 Becker from enforcing her subpoena to Ms. Garvey’s counsel, except that she shall not
20 seek production of the settlement agreement. The court’s order that Precor produce the
21 settlement agreement in redacted form will provide sufficient disclosure to Ms. Becker.
22 Similarly, the court has no basis to prevent Ms. Becker from subpoenaing Ms. Garvey.
23 Because the court has no jurisdiction over Ms. Garvey or her counsel, it will not order
24 them to respond (or not respond) to any existing or forthcoming subpoena.

25 **C. Request for Attorney Fees and Sanctions**

26 Finally, the court considers Ms. Becker’s request for her attorney fees expended in
27 connection with these motions as well as an additional monetary sanction. The court can

1 award attorney fees to a party who successfully brings a discovery motion, unless
2 circumstances make such an award unjust. Fed. R. Civ. P. 37(a)(5)(A)(iii). In this case,
3 the court finds that an attorney fee award would be unjust. First, both parties prevailed in
4 part in their discovery motions. Precor presented legitimate concerns not only about the
5 discovery Ms. Becker requested,² but about the manner in which Ms. Becker and her
6 counsel had used prior discovery to contact other Precor harassment complainants. The
7 court finds neither attorney fees nor sanctions to be appropriate in these circumstances.
8 The court also strongly suggests that if further discovery disputes arise, the parties avail
9 themselves (and their clients) of the expedited procedure for resolving discovery motions
10 found at Local Rules W.D. Wash. CR 37(a)(1)(B). Cross-motions like the ones before
11 the court are needlessly time-consuming and impose unnecessary costs on the parties.

12 IV. CONCLUSION

13 For the reasons stated above, the court GRANTS both discovery motions (Dkt.
14 ## 36, 38) in part and DENIES them in part. The court DENIES Defendants' motion to
15 seal (Dkt. # 46) two pages from the transcript of Ms. Becker's deposition. Ms. Becker
16 did not respond to the motion, and Defendants failed to point to any facts that overcome
17 the "strong presumption of public access to the court's files." Local Rules W.D. Wash.
18 CR 5(g)(2). The clerk shall unseal the documents at docket numbers 45 and 53.

19 DATED this 16th day of September, 2009.

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22 The Honorable Richard A. Jones
23 United States District Judge

24 ² Ms. Becker is mistaken when she claims that sanctions are necessary because Precor ignored a
25 prior court order declaring evidence about Ms. Garvey's claims relevant. The court's prior order
26 merely noted "the potential relevance of Ms. Garvey's 2004 complaint and settlement," and did
27 so only in concluding that Ms. Becker had crossed the minimal threshold for including
allegations about that issue in an amended pleading. Apr. 9 Ord. (Dkt. # 29) at 3. Precor's
challenge to the relevance of evidence related to Ms. Garvey for discovery purposes is
reasonable, even if the court ultimately did not rule in Precor's favor.